

**PUBLIC DEFENDER COMMISSION MINUTES  
NOVEMBER 14, 2005  
WOOD ROOM, SHERATON HOTEL  
BILLINGS, MONTANA**

**Call to Order:**

The Public Defender Commission meeting was called to order at 8:00 a.m. by Chairman Jim Taylor

**Members Present:**

Betty Bichsel, Edgar, Caroline Fleming, Miles City, Jennifer Hensley, Butte, Wendy Holton, Helena, Randi Hood, Butte, Doug Kaercher, Havre, Stephen Nardi, Kalispell, Theda New Breast, Babb, Mike Sherwood, Missoula, James Park Taylor, Missoula.

**Members Absent:**

Daniel Donovan, Great Falls, Tara Veazey, Helena.

**Other Interested Parties:**

Don Judge, representing Teamsters Local 190; Scott Crichton representing the ACLU; Penelope Strong, Yellowstone County Chief Public Defender, and Vicki Dunaway, representing the State Bar of Montana.

**Approval of Minutes:**

Caroline Fleming moved to accept the minutes of the October 4, 2005 meeting. Wendy Holton seconded the motion. Motion unanimously carried.

**Chief Defender's Report:**

Randi Hood advised the Commission work needed to begin on a plan to develop regions and appoint subcommittees for districting. The Commission needs to formulate a way to deliver services to all of the city courts and the justice courts. The two attorney positions in the state office are defined as being a training coordinator and a person who is in charge of the contracted personnel. It is Ms. Hood's opinion that additional responsibilities should be added to those positions, and one is to make the person in charge of contracted people be a

“go-to” person on the courts of limited jurisdiction.

With regard to staff, an executive director was advertised for. Fourteen applications were received, three were from out of state. None of the out of state applicants scored high enough to receive an interview. Three of the applicants who scored significantly higher than the others in terms of rating, will be interviewed on November 15.

Advertisements have also been placed for administrative assistants. Ms. Hood intends to hire two administrative assistants, one to serve as a paralegal to Ms. Hood, and one to perform general office duties. Interviewing will begin next week for those positions. Ms. Hood received the job description for an IT position which will also be advertised for.

There are three attorney positions listed in the bill connected to the state office; the training person, the contracted personnel person, and a chief appellate defender. Ms. Hood requested feedback from the Commission on the chief appellate defender position, and also input about the recruitment of attorneys for the state office. The Commission has requested an Attorney General's opinion relating to the language that speaks to whether all current public defenders will be taken into the new system. Ms. Hood contacted Chris Tweeten regarding receiving the Attorney General's opinion, and was advised the opinion is being drafted by John Ellingson, who is out of the country, but will return on November 15. Mr. Tweeten thought the opinion will be available by the end of next week.

#### **Public Comment and General Discussion:**

Scott Crichton, of the ACLU, congratulated the Commission on their efforts. Mr. Crichton was encouraged by the position of the Commission with regard to putting programs together, and the ACLU offered its assistance in convincing the legislature to fulfill the commitment it has made.

Mr. Don Judge of Teamsters Local 190 also congratulated the Commission on their efforts, and felt the Commission was up to the job ahead of them. Mr. Judge reported he had attended meetings with the Legal Services Division of the Legislative Council and advised there are conflicts in the labor contracts that affected the workers in Yellowstone County and Missoula County which contain some provisions, that when enacted, will exceed the 4% salary cap limitations of the statute. Those include promotions, grade step-ups, longevity increases, and retention and recruitment provisions of the contract. The Legal Services Division indicated those should not be included in the salary in terms of the determination of salary, that they are separate statutes under the

law. Mr. Judge advised they will be requesting a legal opinion of the Legislative Council regarding the above matters. The answer will not be available until the school funding issue has been resolved. The Commission will be advised of the opinion as soon as it is received from the Legislature.

Ms. Hensley asked Mr. Judge if it is the intent of his locals to remain county employees contracting with the state for their salary increase and their benefit increase rather than switching over to state employees whereas the negotiated contracts wouldn't be there. Mr. Judge replied no, they understand the county units will be gone, and in fact, in Missoula, specifically in the contract, says the county unit disappears. What the union's concern is, and the concern of the employees, is that because the contracts provide for increases in income beyond what the 4% limitation on the bill is, is whether they would be entitled to those increases or when they switch to state workers would they lose longevity, their step increases, and their bonuses. The union's position is to make sure to guarantee what has been negotiated is followed through with and that it applies to the statute in the event they all become a new statewide unit, and in that case, the union will be organizing the statewide unit.

With regard to longevity, Mr. Judge advised most people do not receive longevity and once the two organized locals become a statewide unit, they're no longer under the union contracts. Longevity would be gone unless the union can negotiate it.

Mr. Sherwood asked Mr. Crichton if there are educational perspectives that the ACLU would want to see in the basic package for public defenders, and if there are perspectives ACLU wanted to see, is there any chance that ACLU could provide the educators. Mr. Crichton responded the ACLU doesn't do criminal defense work so there are not many resources within ACLU for the state that would be of assistance in that instance. Mr. Sherwood stated he was thinking of the discrimination aspect and asked if the ACLU activities are an important educational component for the public defender lawyers. Mr. Crichton replied he believed whoever is selected as a trainer could possibly communicate with a training specialist from the NLEDA to focus on legal defense education.

Penny Strong, as the Chief Public Defender, Yellowstone County, offered she is a strong supporter of the new system as she believes it is going to be consistent in statewide supervision and training which is fundamental to effective defense services. She advised the NLEDA provides excellent training seminars for managers with regard to personnel management issues.

Mr. Sherwood expressed concern over two unions that are potentially in conflict on how things are going to be represented, citing lack of resources to be involved in internal fights between the unions. Mr. Judge advised it should not be a problem for the Commission in the sense of the Commission having to devote energies to the organization of its workers. Mr. Judge stated he hoped the new management structure would not fight to keep the employees from organizing; that if you allow the union to go forward and the decision to come down through the Montana Public Employees Collective Bargaining Act as to who is going to represent these workers, then you're not going to burn any resources.

Mr. Judge stated the biggest conflict the public defenders face is a great disparity of wages and benefits and the lack of continuity across the state, and that's going to cause some conflict to be able to bring all of that up to some kind of standard. He also stated that based on his experience, the State Department of Administration, Labor Relations Division negotiates for all of the state agencies with participation from the state agencies.

Penny Strong gave a brief historical background of union negotiations in Yellowstone County, and advised she could arrange for Human Resources to provide the Commission with the wage scale for her attorneys if the Commission was interested in that information. Ms. Hood stated that was something the Commission will want to get from every office so they could look at what people are being paid and what kind of disparity there is and make some judgments about how they are going to make things more equitable across the board.

Ms. Strong provided the Commission with a letter authored by her and Carl DeBelly to Chief Justice Karla Gray regarding proposed standards for counsel representing the interests of indigent persons at government expense, along with a Yellowstone County Public Defender Performance criteria No. 001 working draft regarding standards for client contact.

Mr. Sherwood inquired of Ms. Strong as to what problems this Commission or the state public defenders office may run into with the Yellowstone judiciary. Ms. Strong stated the Yellowstone judiciary is very concerned about the cases moving through the system, and that it should be done at a certain pace. One other thing is a court rule that all of the clients sign a Waiver of Speedy Trial to get a continuance even if the 200 days for felony has not been approached.

Chairman Taylor commented that one thing he wanted to push very

strongly for is an expedited process for public defenders to see their client whenever they need to. Mr. Nardi advised there is a statute that says an attorney shall be allowed to see his attorney right away.

Mr. Crichton advised in regard to jail conditions, that the crisis is bigger than what his office can systematically challenge, and hoped that the Public Defender Commission is one component that is going to take some pressure off the overpopulation county by county by county. The ACLU is trying to figure a creative marriage between litigation, legislation and reform that can hopefully see that they are using the best resources driven by public safety rather than other concerns.

Mr. Sherwood inquired of Mr. Crichton if there are standards that this Commission could adopt or at least urge the legislature, which would then have the power of law to adopt, that would have some impact on poor conditions in jail under the guise of being able to provide either better representation or effective representation.

Mr. Crichton replied that jail standards have been discussed with county commissioners and jail administrators for as long as he has worked for ACLU which is going on 18 years. They've made it to the legislature numerous times and then they haven't passed. At the jail summit, there was a renewed commitment by the people at the table to see that jail standards are introduced and passed this time. The standards were promulgated by the Sheriff and Peace Officers Association. Mr. Crichton advised he would try and get a copy to the Commissioners.

**Appointment of Committees:**

Districting Committee: Caroline Fleming, Jennifer Hensley and Steve Nardi.

Conflicts and Grievance Procedure: Betty Bichsel, Theda New Breast, James Taylor and Tara Veazey.

Determining and implementing indigence qualifications: Wendy Holton and Doug Kaercher.

There were no other committees formed at this point.

**Committee report on Personnel Rules and Standards:**

Steve Nardi reported that he had went through the statute and started listing things that needed to be in the A.R.M. and what it comes down to is sections 1 through 4 and sections 6 through 14. The statute includes indigent requirements, establishing qualifications for attorneys in terms of education, qualifications for procedures for appeals for eligibility determinations, personnel appeals by attorneys and employees, and defining the scope of public defender services. Mr. Nardi advised the state of Georgia has a model public defender system which is the best system he's seen and could be utilized for formulating their system.

Chairman Taylor advised the standards committee has not met yet. Standards need to be implemented on juvenile representation, abuse and neglect cases and involuntary commitments. The Montana Supreme Court, especially on abuse and neglect cases and on involuntary commitments, has adopted, by court rule, some much higher standards than they do for criminal cases in terms of the kind of representation that's required. They have some fairly specific things that are established by case law that the Commission is going to have to comply with when it adopts standards.

With regard to the question of a numerical caseload, Chairman Taylor advised that is something the committee would have to deal with, and he would like to set a date to have a draft to bring back to the Commission and distribute to the public once the Commission approves it for public comment.

Mr. Sherwood offered to go through juvenile representation, abuse and neglect, involuntary commitments, and compare them to the statute. It was decided to wait until the subcommittee meets to go through them. Members of the subcommittee are Betty Bichsel, Wendy Holton, Mike Sherwood, James Taylor and Tara Veazey. A subcommittee conference call was set for Friday, December 2, 2005, at 2:00 p.m.

#### **Appellate Defender Office and Scope:**

Discussion was held regarding bringing all the appellate cases into an appellate defender's office wherein trial counsel would do trials and sentence review except in cases of where there's a conflict, but all the appellate work would be done by the appellate defender's office.

Ms. Hood suggested looking at § 47-1-201, MCA, which says that the chief public defender shall hire or contract the following people, and these are

exempt from classification; (a)(ii) is a chief appellate defender. She proposed hiring a chief appellate defender, and then have that person begin by doing an audit of the appellate defender figuring out what their caseload is, how many cases are not getting done by them, and put together a proposal as to what it would take to move all of the cases to that office.

Chairman Taylor advised the cite Ms. Hood was referring to is Section 9. Section 9 says beginning July 1, the chief public defender shall hire and supervise a chief appellate defender. Section 70, sub 2 says on July 1, all work of the Appellate Defender Commission and staff in the office of the public defender, pursuant to the Appellate Defender Act, must be officially transferred to the office of the state public defender. After discussion, there was no opposition to putting all the appellate functions in that office.

**Defender Services Bureau:**

Discussion was held regarding the pros and cons of a Defender Services Bureau. Memos from the chief public defenders around the state suggested there be created within the Office of the Public Defender a Defender Services Bureau analogous to the Prosecution Services Bureau in the Attorney General's office. It would be a unit that would be designed to do high profile cases, death penalty cases, and complex cases that maybe one office can't handle, but another one can, so as to provide services in many ways targeting the smaller communities with a higher level of service than they normally provide given the resources they have available. The consensus of the discussion was the Commission should create a Defender Services Bureau, staff it with one person to start with, and be flexible on how it's staffed.

**Proposed Meeting Dates:**

December 9<sup>th</sup>, 2005, in the Butte office.  
January 23, 2006, in Missoula.  
No date set for February

**Old Business:**

Mr. Kaercher advised he had visited with the State Budget Office and they were very specific about stating that those positions that were put in the budget were pretty much hypothetical, and the Commission should look at them in that fashion and change them around the way it see fit. The Commission does not have to go down the line to hire all the positions.

**Afternoon Session:**

Chairman Taylor announced there will be a seminar the 16<sup>th</sup> and 17<sup>th</sup> of March at Chico Hot Springs.

Theda New Breast advised she had emceed and facilitated at a meeting of the social service individuals from the reservations. Governor Schweitzer was in attendance along with all of the state people that deal with health and human services. She reported there was interaction and open communication between state officials and the tribes that did not exist before.

Chairman Taylor followed up stating Tara Veazey had suggested the possibility for applying for a Sorrell fellowship to study reasons for the disparity in incarceration in Native Americans in Montana. Another possibility for discussion is the Sorrell Gideon project has grants available on a rolling basis; there are no specific deadlines and he feels it would be advantageous for the Commission to consider applying for a grant to get some money to study the issue, to talk to the people on the reservations, get not just some anecdotal evidence but some hard data on what's been happening and why it's been happening. The Commission can apply for grants under the authority of the Act.

Ms. New Breast advised that Carolyn Juneau had tried to get the disparity study done through the state and it didn't happen, and she may have data. Betty Bichsel, Caroling Fleming and Theda New Breast will be on the committee to look into application for a grant.

Ms. New Breast also advised the Commission members that the Blackfeet Tribe is looking at an alternative process for justice called circle justice. This alternative circle justice is being used in the Blood Reserve in Canada for their juveniles. Governor Schweitzer has sent a representative from Montana to look into the possibility for use in Montana prisons.

Ms. New Breast feels that anybody who practices law in the state of Montana should know a baseline history of the tribes and tribal culture. Ms. Strong suggested contacting people from Little Bighorn and Dull Knife Colleges at Northern Cheyenne and Crow as cultural experts who may be willing to come and speak about historical cultural orientations.

**Additional Public Comment:**



Mr. Crichton thanked the Commission for their congeniality. He added that Dan McGee, towards the end of this process of passing SB 146, actually was starting to reflect about shorter sentences, as he began to see the benefit of people sitting down where appropriate with offenders and offended coming up with some communal reconciliation. Mr. Crichton believes this Commission has to stay focused and has more on its plate than is reasonable to expect to be accomplished without adding to it, but so many of these discussions are so important to making this system as efficient as possible.

Mr. Sherwood brought up the role of social workers in this system. Betty Bichsel advised she had met with her superiors at the Mental Health Center and invited several people to come, but everyone was busy. She had met with Carl Eby of the Hub, a drop-in center, and he had good suggestions on what could possibly take place as far as case management. The mental health center relies on case management in that they do a lot of leg work so the psychiatrist doesn't have to go out and get things taken care of, a person is hired specifically to do that. They would like to see case managers come into play much the same as a mental health representative and to be the liaison and set up some type of rehab program for the mentally ill.

Ms. New Breast announced that on Wednesday and Thursday, November 16<sup>th</sup> and 17<sup>th</sup>, at the Billings Hotel, all of the Montana and Wyoming tribes are meeting to plan strategy around the meth epidemic. Three tracts are involved; one is treatment; one is medical nursing, and the third is the law enforcement and the judicial corrections around it.

There being no further business to come before the Commission, Jennifer Hensley moved to adjourn the meeting. Caroline Fleming seconded the motion. Motion unanimously carried.

Meeting adjourned at 1:55 p.m.